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R. Feldman
Proc II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190749

DATE: January 25, 1978

MATTER OF: D. N. Owens Company

DIGEST:

1. Where specification is clear and definite and fully sets forth requirements of Government, and there are no characteristics which cannot be described adequately in the applicable specification, agency erroneously required submission of bid sample. Therefore in circumstances, bidder who did not submit sample prior to opening may be considered for award even though IFB required bid sample be furnished by opening date.
2. Where IFB fully sets forth requirements of Government, bidder obtains no undue advantage by not submitting required sample before bid opening and integrity of competitive bidding system is not hindered because Government may require bidder to perform in accordance with the specifications notwithstanding failure to submit sample.

D. N. Owens Company (Owens) protests the award of a contract by the Bureau of Prisons (Bureau) to M.S. Ginn & Company (Ginn) for file folder insert assemblies. The Invitation for Bids (IFB) No. 100-4493 required that a bid sample be furnished at bid opening as part of the bid. Of the five bids received, only Owens submitted a bid sample. Owens contends that Ginn's bid should have been rejected as nonresponsive for failure to submit the bid sample, and that Owens should receive the award.

In accordance with Federal Procurement Regulation (FPR) § 1-2.202-4(e) (1964 ed.) the IFB provided that:

"BID SAMPLES: (a) One sample of the File Folder Insert Assembly must be furnished as a part of the bid, and received before the time set for opening bids. Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.

"(b) Failure of samples to conform to all such characteristics will require rejection of the bid. Failure to furnish samples by the time specified in the Invitation for Bids will require rejection of the bid, except that a late sample transmitted by mail will be considered under the provisions for considering late bids, set forth elsewhere in this Invitation for Bids."

However, the contracting officer relying on our decision in 16 Comp. Gen. 65 (1936) and Bureau of Prisons Policy Statement 12820A(c) gave Ginn the opportunity to submit its bid sample after opening. The Bureau policy statement provides in pertinent part:

"Failure to furnish a sample may be cured, but refusal to supply samples called for by the specifications * * * requires rejection of the bid. However it is advisable to give the bidder an opportunity to cure the deficiency after opening * * * if it is then not furnished, the bid may be rejected."

Upon submission of its bid sample, the Bureau made an award to Ginn as the low responsive, responsible bidder.

As a general rule, bid samples may not be used for determining a bidder's ability to produce the required item. B-164732, September 30, 1968. We have held that where the IFB calls for the submission of a sample for purposes of determining the responsiveness of a bid, the sample must be furnished within the time specified.

See 37 Comp. Gen. 845 (1958). Therefore, where the language of the invitation states that a sample must be submitted or is required to be submitted with the invitation, the failure to do so ordinarily will make a bid nonresponsive and result in its rejection. 36 Comp. Gen. id.; B-172715, July 8, 1971. However, this rule applies only if the sample is required to show exactly what the bidder proposes to furnish and the specifications cannot be stated with a sufficient degree of certainty to permit acceptance of the bid without prior submission of a sample. See 17 Comp. Gen. 940 (1938).

FPR § 1-2.202-4(b) (1964 ed.) adheres to the above principle. This regulation provides in part that:

"Bidders shall not be required to furnish a bid sample of a product they propose to furnish unless there are certain characteristics which cannot be described adequately in the applicable specification or purchase description, thus necessitating the submission of a sample to assure procurement of an acceptable product."

Thus we have stated that specification requirements such as, "shall have dried without tackiness or chalking" and "shall spread easily and sufficiently in one application," and properties of an item such as feel and texture constitute characteristics which cannot adequately be described in a specification and are properly matters for illustrating by bid sample. B-153890, July 30, 1964; B-152669, November 4, 1963. However, as we stated in 17 Comp. Gen. supra at 943 which amplified our decision in 16 Comp. Gen. supra:

"* * * if the advertised specifications, as they should, fully set forth the requirements of the Government, and a bidder without submitting a requested sample with his bid, nevertheless proposes to meet the said specifications and is otherwise entitled to the award, it would usually appear in the interest of the Government to waive as an informality the failure to submit

a sample and, by an acceptance of the proposal as submitted, to bind such bidder to strict compliance with the specifications. * * *

See B-173484, December 21, 1971.

As explained below, we are of the view, that the specifications in the IFB fully set forth the requirements of the Government and that Ginn's bid was properly considered for award. The IFB included Bureau specification no. 4091 for file folder insert assemblies. This specification sets forth in definite clear terms, the size, type of paper, location of holes to be punched and tabs etc. for the folder. Moreover, the specification indicates how the folder insert assembly is put together. For example the specification requires:

* * * All leaves shall have rounded corners. Cloth gusset to be affixed to the last 3 leaves on both sides of each leaf, on the left side of each leaf. Cloth gusset material to be grey cambric or equal.

Specifications For Each Leaf

Assembly Parts	Body Size	Stock	Tab Size & Location
#1	11' W x 9 5/8'H	18 pt. Kraft	1/2' x 6 1/2' top 1/2' x 3' side "
	*	*	*

As noted above the IFB provided that "Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation." However, the solicitation contained no separate list of sample characteristics to be examined, FPR § 1-2.204-4(b), warranting submission of a bid sample. We have been informed by the Bureau that specification 4091, in fact, constituted the characteristics against which the bid samples were evaluated. We therefore conclude that the requirement for submission of a sample was unnecessary for proper bid evaluation because a list of characteristics to be examined was not included in the solicitation and the specifications appear to be

sufficiently definitive to permit adequate bid evaluation without a sample. Accordingly, the submission of the signed bid by Ginn, taking no exceptions to the IFB specifications, bound Ginn to its terms once award was made to it. See 17 Comp. Gen. supra; E-173484, December 23, 1971.

Owens questions whether the acceptance of a bid which does not contain a bid sample is in the best interest of the Government in that this practice allegedly undermines the integrity of the competitive bidding system by giving a bidder which does not submit a sample an opportunity to get out of its bid.

This is precisely the same argument which was addressed in our decision in 17 Comp. Gen. supra:

"* * * if a bidder fails to submit his sample before the bids are opened, the bid must stand by itself, and no action by the parties thereafter with respect to the sample may legally be viewed as altering such bid, or as affecting the contractual obligation, upon acceptance of the bid, to deliver materials strictly in accordance with the specifications. Under such circumstances it is not apparent how bidders might obtain any undue advantage by not submitting requested samples before the bids are opened."

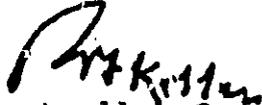
We believe this rationale is applicable in this case because it is clear that the Government may require Ginn to perform in accordance with the advertised specifications irrespective of its failure to submit a sample prior to bid opening.

The referenced Bureau policy statement does not clearly delineate when the failure to submit a bid sample at opening may be waived. Moreover, we have been informed by the Bureau that the contracting officer did not make the finding in writing as to "why acceptable products

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cannot be procured without the submission of bid samples" required by FPR § 1-2.202-4(c) (1964 ed.). Therefore we are recommending to the Bureau that its policy statement be revised to adhere to the applicable regulations and decisions of our Office.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States